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Statement of the Lawyers' Committee on Nuclear Policy
March 2008

ENDING U.S. RELIANCE ON NUCLEAR WEAPONS AND ACHIEVING THEIR GLOBAL ELIMINATION: WISE POLICY AND REQUIRED BY LAW

More than two decades after President Ronald Reagan and President Mikhail Gorbachev seriously discussed the abolition of nuclear weapons at Reykjavik, there is renewed, bipartisan attention to achievement of a "world free of nuclear weapons." That is the objective set by George Shultz, William Perry, Henry Kissinger, and Sam Nunn in their January 2007 and January 2008 op-eds in the Wall Street Journal.

This shift in the policy debate is sorely needed, indeed long overdue. But one dimension of the problem is being ignored: the fundamental unlawfulness of use of nuclear weapons, the threat of which is the foundation of the policy of deterrence still relied upon by the United States. Nuclear weapons cannot be used in compliance with rules of necessity, discrimination and proportionality recognized by the United States as requirements for lawful military operations.

Squarely facing this reality is the responsibility of the United States if it is to be a law-abiding nation. It would also greatly spur and facilitate good-faith negotiation and implementation of measures leading toward a nuclear-weapon-free world, as legally required by the Nuclear Non-Proliferation Treaty. And it would give a powerful boost to diplomatic, law-enforcement and other non-military efforts to prevent the spread of nuclear weapons to additional countries and their acquisition by terrorists.

Dangers of Reliance on Nuclear Weapons

In some ways, the danger of use of nuclear weapons is greater than ever. On top of the risks inherent in the ongoing balance of terror among nuclear powers are the risks of acquisition by additional countries and by non-state actors including terrorists. Another risk factor is the heightened emphasis on possible nuclear use against nations not possessing the weapons. In this environment, the substantial U.S. nuclear arsenal numbering thousands of weapons does not serve U.S. security interests. Nuclear weapons have themselves become the main security threat the United States faces. They are potential tools of asymmetrical attack by weak nations and terrorist groups against the United States and its allies.

The United States should therefore be leading the world in de-emphasizing and de-legitimizing nuclear weapons and working for their elimination. Instead, the United States is actively espousing the legitimacy of U.S. use and threat of use of nuclear weapons – and, hence, at least implicitly, by other states – as an instrument of national policy.

Many years after the end of the Cold War and the demise of the Soviet Union, the United States continues to adhere to the policy of deterrence and embraces nuclear weapons as war-fighting weapons constituting part of the regular arsenal to be used based on real time, spontaneous decision-making in dealing with crises throughout the world, blurring the distinction between nuclear and conventional weapons. U.S. doctrine identifies options for preemptive or responsive use of nuclear weapons against nuclear, biological, and chemical weapon attacks or capabilities, against overwhelming conventional attacks, and even in response to “surprising” military developments – in short, when deemed militarily useful in virtually any circumstance.

This is not just bad policy and extremely dangerous; it is unlawful. Established rules of the law of armed conflict make the use and threat of use of nuclear weapons unlawful. The United States has long recognized that these rules of law apply to nuclear weapons.

Unlawfulness of Use of Nuclear Weapons

The law of armed conflict is both conventional (treaty-based) and customary (binding all nations). It is set forth in legal manuals of U.S. military services; in the U.S.-ratified 1907 Hague and 1949 Geneva Conventions and in other widely ratified treaties including the 1977 Protocol I to the Geneva Conventions and the 1998 Rome Statute of the International Criminal Court; and in the 1996 advisory opinion of the International Court of Justice on the legality of threat or use of nuclear weapons.

U.S. military manuals record and explain the law of armed conflict for the guidance of U.S. armed forces. The manuals expressly acknowledge that the rules of necessity, proportionality and discrimination must be followed for U.S. military operations to be lawful. The unlawfulness of use of nuclear weapon follows from the United States’ own statements of those rules.

The ***rule of discrimination*** prohibits the use of a weapon that cannot discriminate in its effects between military targets and non-combatant persons and objects. It is unlawful to use weapons whose effects are incapable of being controlled and therefore cannot be directed against a military target. If the state cannot maintain such control over the weapon, it cannot ensure that such use will comply with the rule of discrimination – and may not lawfully use the weapon. Nuclear weapons, including “low-yield” weapons, cannot comply with the rule of discrimination. The effects of nuclear weapons, including radiation effects, are uncontrollable; they are not subject to the control of the user or of any force on earth. Even the blast, heat and electromagnetic impulse effects of nuclear weapons are beyond human control.

As the International Court of Justice observed, “*The destructive power of nuclear weapons cannot be contained in either space or time.*” The Court explained that the detonation of a nuclear weapon “*releases not only immense quantities of heat and energy, but also powerful and prolonged radiation. [T]he first two causes of damage are vastly more powerful than the damage caused by other weapons.... [§] The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future*

environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.”

The ***rule of proportionality*** prohibits the use of a weapon whose potential collateral effects upon non-combatant persons or objects would likely be disproportionate to the value of the military advantage anticipated by the attack. The rule of proportionality requires that a state using a weapon be able to control the effects of the weapon. If the state cannot control such effects, it cannot ensure that the collateral effects of the attack will be proportional to the anticipated military advantage. The effects of nuclear weapons being uncontrollable, their use is precluded by this requirement.

Under the ***rule of necessity***, a state may only use such a level of force as is necessary to achieve the military objective of the particular strike. Any additional level of force is unlawful. Nuclear weapons in many cases cannot comply with the rule of necessity because modern high tech conventional weapons – where the United States has the overwhelming advantage – and other tactics can address military targets. Further, regardless of whether alternative means of attack exist, the fact that the state cannot control the effects of nuclear weapons, and therefore cannot ensure that the force used is no greater than that required to attack the target, appears to render their use incompatible with the rule of necessity. In any case, even if an attack is deemed to meet the requirement of necessity, it must also meet the requirements of discrimination and proportionality, and a nuclear attack cannot do so due to its uncontrollable effects.

Aside from their uncontrollability, nuclear weapons generally cannot comply with the requirements of discrimination and proportionality because of their direct (*e.g.*, blast, heat, radiation, electromagnetic impulse) and indirect (*e.g.*, escalation) effects. Nuclear weapons generally cannot comply with the rule of discrimination because neither the direct or indirect effects distinguish between military targets and civilian persons and objects. They generally cannot comply with the rule of proportionality because the potential effects, including escalation, exceed the value of most, if not all, military targets. Moreover, effects on the natural environment are to be taken into account in assessing proportionality, a feature of the rule stated by the International Court of Justice and codified in the Rome Statute of the International Criminal Court.

It is sometimes argued that, even if it were unlawful for the United States to use nuclear weapons in the first instance, such weapons could be used in reprisal, *i.e.*, as an otherwise unlawful act legally justified to respond to an enemy’s unlawful act. However, it is well established – and the United States recognizes – that, to be lawful, reprisals must be limited to a level of force necessary to cause the other side to cease its unlawful attack and must be proportional to that attack and necessary to address it. These preconditions to the lawfulness of a reprisal preclude the lawfulness of using nuclear weapons in reprisal. Their uncontrollability prevents limiting such a strike to the permitted purpose, nor could the effects of such a strike be limited to what is proportional or necessary. Further, as stated by the International Court of Justice, under the “fundamental” and “intransgressible” requirement of discrimination: “*States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilians and military targets.*” (Emphasis supplied.)

A war crime is a violation of the law of armed conflict. Violations of the rules of necessity, proportionality and discrimination are war crimes. The use of nuclear weapons by the United States would be a war crime.

This conclusion is consistent with the opinion of the International Court of Justice. The Court advised that threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, but could not conclude definitively whether such threat or use would be lawful or unlawful in an extreme circumstance of self-defense involving the very survival of a state. The Court cited the insufficiency of facts at its disposal as one reason for declining to address all circumstances. A body extremely knowledgeable about the effects of nuclear weapons and doctrines regarding their use has applied key rules stated by the Court and reached a conclusion similar to ours. In a 1997 book, *The Future of U.S. Nuclear Weapons Policy*, the Committee on International Security and Arms Control of the National Academy of Sciences stated: “[According to the Court], any threat or use of nuclear weapons must be limited to, and necessary for, self defense; it must not be targeted at civilians, and be capable of distinguishing between civilian and military targets; and it must not cause unnecessary suffering to combatants, or harm greater than that unavoidable to achieve military objectives. In the committee’s view, the inherent destructiveness of nuclear weapons, combined with the unavoidable risk that even the most restricted use of such weapons would escalate to broader attacks, makes it extremely unlikely that any contemplated threat or use of nuclear weapons would meet these criteria.”

Threat and Deterrence

The fact that the use of nuclear weapons would be unlawful under the law of armed conflict necessarily means that any specific U.S. threat to use nuclear weapons would be unlawful, and strongly suggests that the policy of nuclear deterrence is also unlawful. This arises from the established rule of the law of armed conflict that it is unlawful for a state to threaten to use – or even to signal its readiness to use – force that it would be unlawful in fact to use. As stated by the International Court of Justice, “*If an envisaged use of weapons would not meet the requirements of humanitarian law [including discrimination], a threat to engage in such use would also be contrary to that law.*” While declining to make a formal pronouncement on the policy of deterrence, the Court further concluded that the policy would be unlawful under the United Nations Charter if use of nuclear weapons in self-defense pursuant to the policy would violate the principles of necessity and proportionality.

Individual Responsibility

Addressing the unlawfulness of the central national security policy of nuclear deterrence is a matter of grave and imminent concern for the United States. This unlawfulness has significance not only for the United States *qua* state, but also for the agents through whom the United States conducts these activities – the civilian, military and industrial leadership. As the Nuremberg judgments established for all time, a state’s leadership, necessarily including the President, chief foreign policy officials, and military leadership controlling nuclear weapons and related programs and policies, and potentially as well designers and manufacturers of the weapons, may be subject to criminal liability for violation of the law of armed conflict.

Whatever the level of awareness of the U.S. civilian and military leadership as to the potential effects of the bombs used on Hiroshima and Nagasaki, the mind-numbing extent and uncontrollability of such weapons’ effects – even graver now due to the far greater destructive capacity of today’s nuclear weapons – are public knowledge now. That knowledge is certainly known or imputed to our civilian, military and industrial leadership. This awareness is significant because the *mens rea* standard for criminal culpability under international law includes recklessness, the conscious disregard of known risk; strict intentionality is not required. Further, at least when there has been an actual or attempted use of nuclear weapons, individual contributions to that end in “a group of persons acting with a

common purpose” (Rome Statute of the International Criminal Court) or in “formulation or execution of a common plan” (Nuremberg Charter) would potentially trigger criminal liability.

The Obligation of Good-Faith Negotiation of Nuclear Disarmament

There is a solution to the terrible risks and dilemmas of security, law, and morality caused by ongoing U.S. reliance on nuclear weapons: immediate de-emphasis of their role in U.S. policy coupled with determined work with other nations for their global elimination. This is not only the wise course of action; it is legally required.

Article VI of the Nuclear Non-Proliferation Treaty (NPT) obligates each state party to the treaty to “pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament.” The International Court of Justice unanimously concluded that this is an obligation not just to begin but also to “bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.” At the 2000 NPT Review Conference, the United States and other nuclear powers gave “an unequivocal undertaking ... to accomplish the total elimination of their nuclear arsenals” and agreed to take specific steps towards that end. They include: bringing the Comprehensive Test Ban Treaty into force; negotiating a verifiable ban on production of plutonium and enriched uranium for weapons; applying the principles of verification, irreversibility and transparency to the reduction and elimination of nuclear forces; preservation and strengthening of the Anti-Ballistic Missile (ABM) Treaty; diminishing the role of nuclear weapons in security policy, to minimize the risk of their use and to facilitate their elimination; and reducing the operational status of nuclear forces.

Since 2000, however, the United States has failed to work to implement these measures and principles, and in some cases has even gone backwards, as by withdrawing from the ABM Treaty, abandoning verification of U.S.-Russian reductions, more emphatically articulating doctrine on use of nuclear weapons, and modernizing its nuclear weapons complex to be capable of maintaining and upgrading the U.S. arsenal for many decades to come. But a clear road map has been laid out for movement toward a nuclear-weapon-free world; the political will must be summoned to follow it.

Next steps involving only the United States or the United States and Russia, which between them hold about 95% of the world’s 25,000 nuclear weapons, include: U.S. ratification of the test ban treaty; reducing the U.S. arsenal and negotiating a verifiable and irreversible strategic reduction agreement with Russia, which consistently has declared its readiness to go well below the limits prescribed by the 2002 Strategic Offensive Reduction Treaty; working with Russia to end both sides’ posture of readiness for immediate launch of a total of over 2500 warheads; withdrawing the several hundred U.S. nuclear bombs deployed in European countries under U.S. and NATO auspices; resolving the dispute with Russia over the U.S. plan to place missile defense installations in the Czech Republic and Poland; reaffirming assurances of non-use of nuclear weapons against states not possessing them (a core element of the bargain underlying the NPT); and adopting a general policy of non-use of nuclear weapons.

Other steps requiring the participation of many states include: negotiating a verifiable ban on production of fissile materials for weapons that lays the foundation for control of existing materials; bringing other states with nuclear weapons into the process of reduction and elimination; working toward global control of missiles and missile defenses; negotiating a ban on the weaponization of space; strengthening IAEA inspection powers and other barriers to the spread of nuclear weapons; bringing the production of fissile materials to fuel nuclear reactors under multilateral control;

decreasing reliance on nuclear power and increasing reliance on energy efficiency and renewable energy, including through establishment of an international sustainable energy agency; and creating the framework for a nuclear-weapon-free world by negotiating a convention prohibiting and eliminating nuclear weapons, as was done years ago for biological and chemical weapons.

The Imperative of Success

Success in ending the nuclear balance of terror, eliminating existing nuclear arsenals, and preventing the spread of nuclear weapons and their acquisition by terrorists is essential for the safety of Americans and others around the world. Internationally as well as nationally, a consensus is emerging on the necessity and feasibility of achieving a nuclear-weapon-free world. In February 2008, Russian Foreign Minister Sergei Lavrov approvingly cited the Wall Street Journal op-eds setting that goal. In January 2008, UK Prime Minister Gordon Brown stated that *“we will be at the forefront of the international campaign to accelerate disarmament among possessor states, to prevent proliferation to new states, and to ultimately achieve a world that is free from nuclear weapons.”*

Success is also essential for preservation of the system of collective security and international law centered on the United Nations Charter. Absent success, that system may be fatally undermined by the doctrine of preventive war against allegedly emerging but not imminent nuclear weapons threats employed to rationalize the invasion of Iraq and possible military action against Iran. Preventive war is contrary to the UN Charter, which permits use of force only in self-defense against actual or imminent attacks or by authorization of the Security Council. It also is extremely dangerous. Wars are unpredictable; they may give rise to dire circumstances in which one side or the other would consider resort to use of nuclear weapons. Further, the United States retains the option of use of nuclear weapons against another state’s nuclear, biological or chemical weapons capabilities. Especially in combination, the doctrine of preventive war and the doctrine of preemptive or preventive use of nuclear weapons are fundamentally incompatible with the existence of international legal constraints on the use of force; they imply a world of chaos and nihilism. The path of promoting and complying with the UN Charter, disarmament and non-proliferation obligations, and the law of armed conflict is incomparably superior.

Conclusion

The use and threat of use of nuclear weapons are unlawful; their disastrous effects are morally unacceptable; and their possession by some nations but not others is inherently destabilizing. The time has long since come for the United States to end its policy of reliance on nuclear weapons and to take global leadership in eliminating them. It is time to achieve and implement a convention formally banning, worldwide, the possession, threat of use, and use of nuclear weapons.

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